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In the Supreme Court of the United States

OCTOBER TERM, 1944

—
No. 679

M. D. (Doc) BENNETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH
CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the circuit court of appeals (R. 15-16)¹ is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered October 16, 1944 (R. 16). The petition for a writ of certiorari was filed November 15, 1944. The jurisdiction of this Court is in-

¹ References to the printed record are designated "R." References to the stenographic transcript of the record on appeal in the court below, which has been filed with the Clerk of this Court pursuant to stipulation (R. 18), are designated "Tr."

voked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the search warrant, pursuant to which petitioner's dwelling was searched and stolen and counterfeit ration coupons seized, was properly sustained as valid over petitioner's objection that there was not probable cause for its issuance, in that the affidavit pursuant to which it was issued was insufficient.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment provides as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Title XI of the Act of June 15, 1917, c. 30, 40 Stat. 217, 228-229, 18 U. S. C. 611-616, commonly known as the Espionage Act, contains, in pertinent part, the following provisions:

SEC. 2. A search warrant may be issued under this title upon either of the following grounds:

1. When the property was stolen or embezzled in violation of a law of the United States; in which case it may be taken on the warrant from any house or other place in which it is concealed * * *.

2. When the property was used as the means of committing a felony; in which case it may be taken on the warrant from any house or other place in which it is concealed * * *.

* * * * *

SEC. 3. A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched.

SEC. 4. The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witness he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them.

SEC. 5. The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist.

SEC. 6. If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a civil officer of the United States duly authorized

to enforce or assist in enforcing any law thereof, or to a person so duly authorized by the President of the United States, stating the particular grounds or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof, and commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge or commissioner.

STATEMENT

Petitioner was indicted in the District Court for the Eastern District of North Carolina in five counts (R. 1-4), the first of which charged that on February 24, 1944, he unlawfully received, concealed, and retained in his possession, with intent to convert to his own use or gain, gasoline ration coupons, the property of the United States, which had been stolen, knowing the same to have been stolen, in violation of 18 U. S. C. 101 (R. 1-2).² Count two charged that on the same day petitioner unlawfully acquired and had in his possession counterfeit gasoline ration coupons, "in violation of Section 1394.8179 (e)³ of Ration Order No. 5C," issued pursuant

² Neither the sufficiency of the indictment nor the evidence are involved in this petition. However, for the convenience of the Court, we have set forth in the Appendix, pp. 15-17, *infra*, the provisions of law upon which the prosecution was based.

³ This is incorrect and should be Section 1394.8178 (e). Section 1394.8179 was revoked May 11, 1943 (8 F. R. 6181).

to the Second War Powers Act (R. 2). The third count alleged that on February 24, 1944, petitioner unlawfully acquired and possessed counterfeit sugar ration coupons in violation of Section 2.6 of General Ration Order No. 8 and Sugar Ration Order No. 3, issued pursuant to the Second War Powers Act (R. 3). Count four charged that on February 24, 1944, petitioner unlawfully accepted the transfer of, possessed and transferred to another counterfeit gasoline ration coupons in violation of Section 2.6 of General Order No. 8 and Section 1394.8178 (e) of Ration Order No. 5C, as amended, issued pursuant to the Second War Powers Act (R. 3-4). The fifth count alleged that in February 1944, petitioner unlawfully accepted the transfer of and had in his possession gasoline ration coupons unlawfully acquired by him, in violation of Section 1394.8177 of Ration Order No. 5C, amended, issued pursuant to the Second War Powers Act (R. 4).

Before trial petitioner moved to quash a search warrant which had issued to search certain premises occupied by him as a dwelling for stolen and counterfeit ration coupons, and for the return of ration coupons seized through the search (Tr. 5, R. 6-9). The motion was overruled and an exception noted (Tr. 5). At the trial the court permitted the Government to introduce the evidence which had been secured on the search of petitioner's dwelling (Tr. 24-28; Gov. Ex. A-C, Tr. 28), over pe-

tioner's objection that the evidence had been illegally obtained because the search warrant had not been issued upon probable cause in that the affidavit upon which the warrant was based did not show that the affiant had personal knowledge of the facts stated in the affidavit (Tr. 19).

At the trial the Government called as a witness an O. P. A. investigator, who testified that he had participated in the search of petitioner's home under the authority of the search warrant and had found concealed between the slats and mattress of a bed a quantity of ration coupons (Tr. 14, 24-27). Other Government witnesses testified that certain of these coupons were unissued coupons which had been removed without permission from an O. P. A. storeroom and that the other coupons were counterfeit (Tr. 29-31, 32-33).

The Government also introduced evidence not obtained through the search, which showed, in support of count four of the indictment, that petitioner had sold 96 counterfeit ration coupons (Tr. 33-34, 44-45). No testimony was offered by the defense (Tr. 45).

The jury returned a verdict of guilty on each count of the indictment (Tr. 52), and petitioner was sentenced to imprisonment for five years on the first count and for one year on each of the other counts except the fifth, the sentences on these counts to run concurrently with the sentence imposed on the first count (R. 9-11). A

fine of \$500 was imposed on count five (R. 10). On appeal to the Circuit Court of Appeals for the Fourth Circuit, the judgment of conviction was affirmed (R. 16).

ARGUMENT

Petitioner's sole contention (Pet. 9-17) is that the affidavit upon which the search warrant issued is insufficient because it does not set forth facts within the personal knowledge of the affiant to warrant a finding of probable cause. He claims that this defect exists both as to the conclusion in the affidavit that the ration coupons were on his premises (Pet. 10-11, 14) and as to the conclusion that he was guilty of the offenses alleged to have been committed (Pet. 14, 17). With respect to the location of the coupons on his premises, petitioner asserts that the only allegation in the affidavit to support the conclusion is the statement of the affiant "That he has good reason to believe and does believe" that the coupons were on the premises (Pet. 10).¹ With respect to the commission of the offenses charged, petitioner urges that the search warrant itself shows that the finding of probable cause was based solely upon incompetent hearsay evidence (Pet. 14, 15-17).

The circuit court of appeals, in its *per curiam* opinion (R. 15-16), considered the sufficiency of

¹ At page 14 of the petition, it is stated that "Nowhere in the affidavit is there a statement upon the personal knowledge of affiant that the ration coupons were concealed or were in anywise on the premises."

the affidavit upon which the search warrant was based solely with reference to its allegations in respect of the possession on the premises in question of counterfeit ration coupons. Since it held that the affidavit was sufficient in this aspect, it evidently deemed it unnecessary to pass upon its sufficiency with respect to the possession on the premises of stolen ration coupons. The court's opinion is short and hence we do not repeat the considerations upon which the court predicated its conclusion as to the sufficiency of the affidavit with reference to the counterfeit coupons. The affidavit was at least as adequate, if not more so, as to the stolen coupons.

The affidavit in question appears at R. 4-6, and is set forth in the footnote below.⁵ Admittedly, while, as the court below said (R. 15), "the affidavit was not skilfully drawn," we submit that, taken as a whole, it meets the tests as to adequacy enunciated by this and the lower federal courts.

⁵ On this 24th day of February, A. D. 1944, before me John S. Downing, a United States Commissioner in and for the Eastern District of North Carolina, personally appeared M. H. Eastburn, Investigator, Office of Price Administration, who being duly sworn, deposes and says:

That he has good reason to believe and does believe that in and upon certain premises within the Eastern District of North Carolina, to-wit, the premises known as the M. "Doc" Bennett, Residence and place of business and particularly described as follows:

One Bungalow type house, one frame Restaurant or tap (frame)

It is true, of course, that under the Fourth Amendment and Title XI of the Espionage Act, pp. 2-4, *supra*, a search warrant may issue only upon probable cause, which has been defined by this Court as "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with

room type building, one two story Garage or Barn and other small out buildings, located two and four-tenth (2 $\frac{4}{10}$) miles in a southerly direction from Fayetteville, N. C. on Highway #301, the right-hand side traveling south. (above buildings painted white) there have been and are now located and concealed certain property used as the means of committing a felony in violation of the Statutes of the United States, to-wit: Ration order #3, Ration Order #5-C, under the Second War Powers Act. Section #100 and Section #72 under Title #18 of the United States Criminal Code.

That the facts tending to establish the grounds for this application and probable cause of affiants believing that such facts exist, are as follows:

That the said M. "Doc" Bennett has or had acquired, certain properties of the United States, to-wit: Ration Coupons, evidences, which evidence were known by said "Doc" Bennett to have been stolen from the United States Gov't. Further that the said M. "Doc" Bennett had sold and offered for sale the unlawfully obtained properties.

That the said M. "Doc" Bennett has knowledge and there is now concealed on his property, certain property, used as the means of committing a felony/or fraud upon the Office of Price Administration, and against the peace and dignity of the United States, by the use of this property to-wit: Plates, Dies, Impressions, Presses, Machines and devices for use in the printing or making of counterfeit ration documents, coupons, certificates, especially Gasoline Ration Coupons, Sugar Ration Coupons and Sugar Certificates.

which he is charged." *Stacey v. Emery*, 97 U. S. 642, 645; see also, *Dumbra v. United States*, 268 U. S. 435, 441; *Steele v. United States No. 1*, 267 U. S. 498, 504-505; *Carroll v. United States*, 267 U. S. 132, 161; *Shore v. United States*, 49 F. (2d) 519, 521 (App. D. C.). And probable cause cannot "rest upon mere affirmation of suspicion or belief without disclosure of supporting facts or circumstances." *Nathanson v. United States*, 290 U. S. 41, 47. Such facts or circumstances must be set forth under oath in affidavit form. See, 3-5, Title XI of the Espionage Act, pp. 3-4, *supra*. But applying these tests to the instant case, we think that there was an adequate showing made in the affidavit of probable cause for believing that petitioner had concealed on his premises stolen ration coupons which were being used by him as the means of committing the offense of possessing stolen government property in violation of 18 U. S. C. 101 (Appendix, p. 15, *infra*).⁶

⁶ It seems clear that the facts set forth purport to charge a violation of this section and not, as stated in the affidavit and warrant, of 18 U. S. C. 100, which punishes theft of United States property. However, the variance is immaterial. Thus, in *Ray v. United States*, 10 F. (2d) 359 (C. C. A. 6), the court held that a warrant authorizing a search for narcotics was not invalid because the warrant stated that the National Prohibition Act had been violated, where the statements in the warrant showed that the offense committed was a violation of the Harrison Narcotic Act. Also, it is settled that if a seizure is valid, the property may be used against a party in a prosecution for an offense not charged in the affidavit. *Gouled v. United States*, 255 U. S. 298, 311-

The affiant did not merely set forth his unsupported belief, but averred categorically, as the basis for his belief, (1) that petitioner had acquired ration coupons, (2) that petitioner knew these had been stolen from the Government, and (3) that he had sold and offered such coupons for sale. Furthermore, the affidavit also stated that petitioner had on his premises devices for the making of counterfeit coupons and, by fair inference, counterfeit coupons. These facts, taken in their entirety, were sufficient, we think, to warrant a "cautious man" in believing that probable cause existed, particularly in view of the principles that a finding of probable cause is not required to be supported by facts excluding every possibility that the offense had not been committed (*United States v. Lashomb*, 59 F. (2d) 809, 811 (N. D. N. Y.); *In re Kips Bay Brewing & Malting Co.*, 29 F. (2d) 836 (S. D. N. Y.), affirmed, 29 F. (2d) 837 (C. C. A. 2)) and that the evidence upon which probable cause rests need not be set out in detail (*In re Rosenwasser Bros.*, 254 Fed. 171, 173 (E. D. N. Y.).

312; Bookbinder v. United States, 287 Fed. 790, 796 (C. C. A. 3), certiorari denied, 262 U. S. 748.

¹ The cases cited by petitioner (Pet. 10-17) are distinguishable. All of them dealt with affidavits which were clearly insufficient, either because they alleged nothing more than the affiant's belief that the offense charged had been committed (*Nathanson v. United States*, 290 U. S. 41; *In re No. 32 East Sixty-Seventh Street*, 96 F. (2d) 153 (C. C. A. 2); *Giles v. United States*, 284 Fed. 208 (C. C. A. 1);

The second reason advanced by petitioner for the inadequacy of the showing of probable cause is that the record indicates that incompetent hearsay evidence alone was presented to the commissioner (Pet. 15-17). In this connection, placing his reliance on *Grau v. United States*, 287 U. S. 124, *Nathanson v. United States*, 290 U. S. 41, and *Giles v. United States*, 284 Fed. 208 (C. C. A. 1), petitioner argues (Pet. 17) that because "the original affidavit, the testimony and the affidavit before the Commissioner incorporated in the search warrant itself were based solely upon information acquired both *oral* and *written* which indicates the said M. 'Doc' Bennett had obtained and was selling and offering for sale U. S. Government properties known to have been stolen from the U. S. Government, etc., without disclosing the name or names of the informer or informers and as no witnesses or affidavits, in corroboration, were produced before the Commissioner in support of this purely hearsay evidence, as prescribed under the Espionage Act * * *, the search warrant should fall." (Italics as in the petition.) While, as we have indicated (fn. 7, starting at p. 11, *supra*), the cases cited by petitioner involved affidavits of a character much

Veeder v. United States, 252 Fed. 414 (C. C. A. 7)), or because the facts which were set forth did not fairly tend to establish a commission of the offense (*Grau v. United States*, 287 U. S. 124; *Schencks v. United States*, 2 F. (2d) 185 (App. D. C.)).

different than the affidavit in the instant case, this Court said in *Grau v. United States*, 287 U. S. at 128, from which petitioner quotes (Pet. 15-16), that not only must the evidence upon which a search warrant may issue have sufficient probative value with respect to the commission of the offense, but it also must be "competent in the trial of the offense." We submit that the record discloses that this rule has been satisfied. Since under the procedure prescribed by the statute, the judge or commissioner, before issuing a warrant, must examine the complainant on oath and require his affidavit or deposition in writing and cause it to be subscribed (Sec. 4 of the Espionage Act, p. 3, *supra*), and since it is the affidavit or deposition which must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist (Sec. 5, *ibid.*, p. 3, *supra*), determination of the question is necessarily dependent upon the contents of the affidavit, and not upon what the affiant may have testified to before the judge or commissioner. In the instant case, the affidavit does not state that the affiant merely had information as to the facts which he had obtained from other persons, but sets forth the facts directly as matters within the personal knowledge of the affiant. Consequently, this is not a case of a search warrant being issued upon hearsay evidence, as petitioner contends. While it may be that the affiant, in testifying before the

commissioner, gave in part hearsay evidence, this infirmity clearly does not attach to the affidavit, which, on its face, lends itself solely to the conclusion that the affiant had personal knowledge of the facts stated therein.

CONCLUSION

The case involves merely the application of well-established principles, and the court below correctly concluded that the affidavit was sufficient to support the search warrant. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

CHARLES FAHY,

Solicitor General.

TOM C. CLARK,

Assistant Attorney General.

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DECEMBER 1944.



APPENDIX

18 U. S. C. 101 provides as follows:

Whoever shall receive, conceal, or aid in concealing, or shall have or retain in his possession with intent to convert to his own use or gain, any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, which has theretofore been embezzled, stolen, or purloined by any other person, knowing the same to have been so embezzled, stolen, or purloined, shall be fined not more than \$5,000, or imprisoned not more than five years, or both; and such person may be tried either before or after the conviction of the principal offender.

The Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (55 Stat. 236), and by Title III of the Second War Powers Act, 1942 (56 Stat. 176, 50 U. S. C. App. Supp. III, 631 *et seq.*), through which the Office of Price Administration acquired the authority to issue rationing orders, provides in part:

SEC. 2 (a) (5): Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than \$10,000 or imprisoned for not more than one year, or both.

Subsection (a) of Section 1394.8177 of Ration Order 5C, the Gasoline Ration Order, issued by the Office of Price Administration (7 F. R. 9135, 9156), provides as follows:

No person shall transfer or assign any ration, and no person shall accept such transfer or assignment.

Subsection (c) of Section 1394.8178 of Ration Order 5C as amended (8 F. R. 16423) provides as follows:

No person shall transfer, receive a transfer of, possess, or use any forged, altered, or counterfeited folder, coupon book, gasoline deposit certificate, inventory, or other coupon or any other evidence.

Section 1407.202 of Ration Order No. 3, the Sugar Ration Order (9 F. R. 1433, 1450), provides as follows:

No person shall at any time either use or have in his possession or under his control or take delivery of any sugar, certificates, stamps or War Ration Books, where such possession, control, or acquisition is in violation of this order.

Sections 2.5 and 2.6 of General Ration Order No. 8 as amended (8 F. R. 3783, 8 F. R. 9626, 9 F. R. 1325) read as follows:

SECTION 2.5 Acquisition, use, transfer or possession of counterfeited or forged ration document. No person shall acquire, use, permit the use of, transfer, possess or control any counterfeited or forged ration document under circumstances which would be in violation of section 2.6 if the document were genuine or if he knows or has reason to believe that it is counterfeit or forged.

SECTION 2.6 *Acquisition, use, transfer or possession of ration document.* No person shall acquire, use, permit the use of, possess or control a ration document except the person or the agent of the person to whom such ration document was issued or by whom it was acquired in accordance with a ration order or except as otherwise provided by a ration order. No person shall transfer a ration document except in accordance with the provisions of a ration order.